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IN THE

Supreme Court of the United States

October Term, 1964

No. 1184

MYRON M. SPARBER,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner, Myron M. Sparber, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case on March 11, 1965.

Opinions Below

There are none.

Jurisdiction

The judgment of the Court of Appeals of the State of New York here sought to be reviewed was entered on March 11, 1965. That judgment affirmed, without opinion, a judgment of the Supreme Court of New York, Appellate Division, First Department, entered February 18, 1964, which had affirmed without opinion a judgment of the Court of General Sessions, County of New York, entered May 9,

1962, which had convicted the within petitioner of the crimes of subornation of perjury and attempted subornation and had sentenced him to imprisonment. The judgment of the Court of Appeals of the State of New York of March 11, 1965 which is here sought to be reviewed was rendered on the merits in an appeal to that Court by the within petitioner duly taken by permission of a Judge of that Court, from the aforementioned judgment of the Appellate Division affirming the conviction.

As is more fully recited *infra*, the within petitioner duly preserved, in the State Courts, the Federal constitutional questions as to which we here seek certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self incrimination), the Sixth Amendment (right to counsel) and the Fourteenth Amendment (due process of law, unreasonable search and seizure, self incrimination, right to counsel) of the Constitution of the United States.

We are filing—or at least lodging with the Clerk of this Court—this petition for certiorari at the present time without also docketing the record, because petitioner has been granted a stay of execution of his sentence of imprisonment upon the condition that his petition for certiorari is served and reaches this Court by April 24, 1965. The record being voluminous, its certification by the Clerk of the State Court is not yet concluded; we expect to docket the record in the reasonably near future, within the jurisdictional time limits.

Questions Presented

Petitioner, a former member of the New York State Bar,* was convicted (while a member of the Bar) of subornation of perjury and attempted subornation in proceedings for investigation of accident case litigation. The questions are:

1. Was petitioner denied a fair trial and due process of law by the Trial Court's refusal to compel disclosure of certain evidence in the hands of the prosecution which the defense claimed would prove exculpatory?

2. Was the petitioner denied a fair trial and due process of law at his trial, and was he also denied a fair due process forum of appellate review, in that this entire criminal prosecution was in effect initiated and fostered by the judicial branch of the Government of the State of New York —the aforementioned investigation of accident case lawyers in which petitioner's alleged subornation offenses occurred having been conducted by a "Coordinating Committee" which is an official instrumentality of the intermediate State appellate court (the Appellate Division, First Department) which also was the appellate tribunal where petitioner was obliged (over his objection) to bring the appeal from his conviction and sentence herein,** and the Coordinating Committee having acted in this case both as

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* Petitioner was disbarred by reason of his conviction in this case.

** The Appellate Division is the only New York State appellate court where review of a criminal conviction of the instant type may be had as of right on issues of fact, law and sentencing; review in the Court of Appeals of the State of New York is permissive in a case of this type and is limited to issues of law.

a disciplining body and as an initiating and actively participating arm of the District Attorney's office. In these circumstances, has not the judicial branch of the Government of the State of New York been in the position of both prosecutor and judge in this criminal case?

3. Was the petitioner denied a fair trial and due process of law in that the prosecutor used his power of control over the trial calendar in an unconstitutionally oppressive manner so as to confront the petitioner with the unjust alternative of pleading guilty or of being forced to trial before a hostile judge?

4. Was petitioner denied a fair trial before an uncoerced jury, in that the Jury was in effect forced to continue its deliberations over a period of six days and five nights without being instructed that they were free to report a deadlock, and in that the verdict which the Jury finally rendered was manifestly a compromise verdict of the type which violates due process of law?

5. Was petitioner denied a fair trial, due process of law, his constitutional right to counsel, his privilege against self incrimination, and his rights against unreasonable search and seizure, through the admission in evidence at his trial of testimony and of alleged transcripts of deceitfully staged and electronically eavesdropped conversations some of which occurred in petitioner's private office premises and all of which were at a time when petitioner was a prime suspect of criminal investigation in which the Coordinating Committee and the prosecutor were working in conjunction secretly and deceitfully to place petitioner in positions in which he might unknowingly incriminate himself?

Constitutional Provisions and Statutes Involved

The case involves, under the Fourteenth Amendment, the due process clause of that amendment and its Federal-State impingements with respect to the search and seizure provisions of the Fourth Amendment, the self incrimination provision of the Fifth Amendment, and the right to counsel under the Sixth Amendment.

The case also involves N.Y. Penal Law §580 (conspiracy), §§1632 and 2 (subornation of perjury and attempted subornation), and §1294 (grand larceny). These provisions, not being of direct concern under the issues of the present petition for certiorari, are not quoted herein.

The case also involves N.Y. Code Crim. Proc. §399 (corroboration of accomplice testimony), and §428 (discharge of jury upon disagreement). The corroboration provision is not of direct concern in this petition for certiorari. Section 428 N.Y. Code Crim. Proc. is quoted in pertinent part under our "Reasons For Granting The Writ", *infra*.

Statement of the Case and of How the Federal Questions are Presented

(As already mentioned, the certified record will be docketed as soon as possible before the expiration of the ninety-day time limit (which expires June 9, 1965). The record in this case is voluminous, the trial minutes alone being more than 4300 typewritten pages. Both of the appeals below—in the Appellate Division and in the Court of Appeals—were permitted to be heard on the original papers without printing of the record or of an "Appendix", plus a number of photocopies of the trial minutes. Four sets of those

photocopies of the trial minutes have been made available to us through the courtesy of the Clerk of the Court of Appeals, and we shall supply those photocopies to this Court when we file the certified record. The numerical references in parentheses in the following statement of the case are to the original typewritten stenographic minutes of the trial.)

Petitioner, who has been disbarred as a consequence of his conviction in this case, was indicted in May 1960 in a sixteen-count indictment containing one count of conspiracy to commit subornation of perjury, ten counts of subornation or attempted subornation of perjury, and five counts of grand larceny by false pretenses. All sixteen counts involved alleged conduct of the defendant as an attorney in accident cases of his clients. The subornation charges related to testimony of clients and one physician before a body known as the Coordinating Committee On Discipline; the grand larceny charges related to the obtaining of money from insurance companies on alleged false representations. Petitioner was tried on all sixteen counts, but the Jury after deliberations of perhaps unprecedented length (see details *infra*), disagreed on thirteen of the counts, convicted petitioner on one count of subornation and one count of attempted subornation, and acquitted on one count of grand larceny.

Petitioner was sentenced to one and one-half to three years on the subornation charge and to one year and three months to two years and six months on the charge of attempted subornation, to run concurrently.

The "victory" of the prosecution in this case was hard-won to a degree seldom, if ever, matched in the State of

New York, if indeed in any other jurisdiction. The trial consumed fifty-one trial days extending through eleven weeks. The Jury received the case early in the afternoon of March 29, 1962, and except for Sunday, April 2, when the Jury did not deliberate, they deliberated daily and nightly until the evening of April 3, 1962—a total of six days and five nights having elapsed since the case was turned over to the Jury. Nightly during these deliberations (except on the Sunday just mentioned when they did not deliberate) the Jury reported to the Court, at a late hour, that they had not reached a verdict. At around midnight on the fifth day, when the Jury had again reported no verdict, the defense moved to discharge the Jury on the ground that any verdict thereafter would be a coerced verdict in view of the prolonged deliberations; and that the Court should read to the Jury § 428 of the New York Code of Criminal Procedure (quoted at p. 27, *infra*), so that the Jury could learn that they were permitted to report that they were deadlocked, whereupon the Court in its discretion could discharge them; both of these requests were denied (4300-4302), and the next evening the Jury at last brought in its verdict. Nowhere in its instructions to the Jury had the Trial Court told them anything about a Jury's right to disagree on a verdict for the case as a whole (4103 et seq.).

That petitioner's guilt was far from overwhelmingly proved to the uncoerced satisfaction of the Jury is indicated by the Jury's disagreement on thirteen of the sixteen counts and its acquittal of petitioner on one count. These disagreement counts involved six of the seven accident case clients whom petitioner allegedly suborned; and as to the seventh client, Lewis Rice, the conviction for attempted subornation was accompanied by an acquittal on

the insurance company-grand larceny false representation count involving that same client; the other conviction count for subornation involved a physician, Dr. Simon G. Igra, who had treated some of petitioner's clients—it is noteworthy that petitioner was not convicted under any of the Counts relating respectively to those same clients themselves.

The evidently compromise character of this evidently coerced verdict must be considered, furthermore, in the light of the exceedingly dubious legality and constitutionality of several aspects of the trial—we realize that not all of these dubious items present Federal questions, but we think the case as a whole cannot be meaningfully evaluated in Federal terms without noting the entire miscellany of unfair and improper procedures which were resorted to in this trial to secure a conviction.

For brevity, we shall merely enumerate the errors which we urged in the two appeals below under each of the two conviction counts:

As to the conviction for attempt to suborn Lewis Rice, we urged (1) that Rice, himself an accomplice witness whose testimony was a tissue of evasions (e.g., 92-101, 110-134, 145-164), was insufficiently corroborated under N.Y. Code Crim. Proc. § 399* because none of the supposed corroboration—except certain typewriter testimony which was shatteringly impeached (witness McNally, 3140-3328)—went to the essential question of petitioner's *knowledge* of the alleged falsity of the claim of loss of employment which petitioner was charged with having suborningly attempted to in-

* Required corroboration of accomplice testimony.

duce Lewis Rice to assert before the Coordinating Committee; (2) that the Trial Court gave the Jury no instructions to the effect that such alleged scienter of petitioner had to be corroborated; (3) that the Trial Court erred in instructing the Jury that Lewis Rice was not an accomplice as a matter of law (4154-4155); (4) that the Trial Court in its instructions to the Jury had flatly misstated the testimony of the witness Conrad, the People's "star" witness on the Lewis Rice charge, Conrad having said that the petitioner asked Rice whether the latter "would testify that he doesn't remember whether he worked" for a certain employer (84-85), whereas as the Court instructed the Jury that Conrad said petitioner had affirmatively asked Rice to testify that he had worked for said employer and that petitioner had asked Conrad himself to tell Rice to lie about this (4154-4155, 4177, 4192); (5) that it was a denial of Federal due process for the Trial Court to refuse to compel disclosure of the Coordinating Committee testimony of one Daniel Schliftman which the defense claimed would be exculpatory (2542-2553, 2565-2566, 2570-2578); and (6) that it was prejudicial error for the Trial Court to allow intermingling of the charges and the proofs under other counts of the indictment with those under the Lewis Rice subornation count (e.g., 4207).

As to the conviction for subornation of Dr. Igra (i.e., allegedly suborning false testimony before the Co-ordinating Committee as to medical treatment of petitioner's clients), we urged (1) that Dr. Igra, an accomplice witness of destructively impeached credibility, was insufficiently corroborated by legally or constitutionally admissible evidence because the "corroboration" came from Dr. Igra's wife, herself an accomplice as a matter of law whom the Court

declined to treat as such (4164), and from miniphone recordings which we discuss further *infra*; (2) that it was prejudicial error to instruct the Jury that they could use the testimony of Lewis Rice to convict the defendant under the count involving Dr. Igra (4176-4177), there being no conceivable justification for this incomprehensible intermingling of the two situations which were wholly factually distinct from each other; and (3) that evidence was admitted under an erroneous application of the theory of "prior consistent statement" (3035 et seq., 3059 et seq.).

In addition, we urged the above noted points as to coerced and compromise verdict, plus the other Federal questions recited *supra* in our "Questions Presented" herein.

Petitioner took the stand and testified in his own defense at the trial, denying all the charges and remained unshaken in all respects after cross examination (see, e.g., 3474 et seq. re charges involving Dr. Igra, and 3524-3529, 3536-3537 re charges involving Lewis Rice; for petitioner's entire testimony, see 3461 et seq., 3468 et seq., 3559 et seq., 3821 et seq., 3828 et seq.). Petitioner introduced evidence of his good character, by forty-one witnesses all of whom were responsible persons of the highest type in community, government or business affairs, including ten judges (3397 et seq., 3482 et seq.).

Petitioner also moved in the Appellate Division and requested in his brief in that Court (Point VI, p. 149) that the appeal be transferred to the Appellate Division of another department on the ground that the Coordinating Committee was an instrumentality of the First Department and had in effect initiated and actively participated in the criminal prosecution which was now to be reviewed by the First

Department. Such transfer was not granted. We repeated these contentions before the Court of Appeals (Appellant's brief, Point IV, pp. 113 et seq.), where, again, relief was denied.

The Appellate Division affirmed the conviction without opinion. The Court of Appeals affirmed the judgment of the Appellate Division without opinion. A motion is before the Court of Appeals to amend the remittitur so as to reflect that the Federal questions which we here raise were considered and passed upon by that Court was granted on April 22, 1965 (Appendix B hereto, *infra*). In order that this Court may have before it a complete statement of the points which we raised in the Court below, we are printing in Appendix C, hereto, *infra*, the text of the Index of our brief in that Court; substantially the same points were raised in the Appellate Division.

Reasons for Granting the Writ

1. In regard to the conviction on the count of attempted subornation involving petitioner's accident case client, Lewis Rice—it being alleged that petitioner tried to suborn Rice to testify falsely that he had lost certain employment time—a vital segment in the proofs against petitioner will now be noted in more detail than was convenient in our Statement of the Case, *supra*. A prosecution witness named Norman Baron conceded in cross examination that his partner Daniel Schliftman could well have handled the questioned employment of Lewis Rice (2396-2409). The defense therefore wanted the Coordinating Committee testimony of Schliftman for the purpose of further cross examination of Baron (2543-2553, 2565-2566, 2570-2578).

The prosecutor adamantly refused to surrender this testimony (which had been turned over to him by the Coordinating Committee) on the bland ground that it was "secret", and the Trial Court sustained the prosecutor in this position(*ibid*). The denial of relief under the application which was thereafter made by the defense before the Appellate Division during a recess of the trial allowed for that purpose, did not touch the constitutional aspects of the question, and it scarcely could have, because our constitutional position which we are herein asserting is based upon a decision of this Court which was not handed down until after the instant trial. See *Brady* v. *Maryland,* 373 U.S. 83, where it was held that a state prosecutor's suppression of exculpatory evidence is a denial of due process even where such suppression is not discovered until after trial and conviction. The issue as thus constitutionally formulated was unavailingly presented to both of the appellate courts below. It is submitted that this Court's intercession is needed in our case to vindicate the important principle of *Brady* v. *Maryland.*

2. Since this case involves alleged misconduct on the part of a lawyer, it was important that a proper and fair line be preserved as between the disciplinary and the criminal-prosecutive features of the situation. The within indictment arose from an investigation by a Coordinating Committee On Discipline which was the direct creation and instrumentality of the Appellate Division, First Department, of the Supreme Court of New York. In an affidavit filed in said Appellate Division, First Department, by Henry Wiener, Esq., sworn to March 1, 1962, as Chief Counsel of the Coordinating Committee, it was averred:

"The Co-ordinating Committee on Discipline, pursuant to an order of the Appellate Division of the Supreme Court of the State of New York, First Department, dated February 3, 1959 has been conducting an inquiry into the handling of personal injury claims by attorneys and those associated with or employed by them, and in connection therewith has been conducting a specific inquiry into the practice of said Myron M. Sparber with respect to the handling of personal injury claims. During the course of said inquiry the sworn testimony of some 70 witnesses were taken, and it developed therein, in the judgment of the Committee, that there were indicated violations of the Penal Law of the State of New York.

Pursuant to a standing order of the Appellate Division of the Supreme Court, First Department, dated December 30, 1959 the Coordinating Committee was directed, whenever it was apprised of or obtained information indicating possible violations of the penal law, to divulge the same to the District Attorney of the County having jurisdiction of the prosecution of such alleged violations, including the turnover of minutes of the testimony of witnesses taken in its preliminary inquiry. Accordingly, the Co-ordinating Committee, pursuant to said order, did turn over to the District Attorney of New York County the minutes of a number of witnesses who had testified before the Co-ordinating Committee in the preliminary investigation of said Sparber so that the District Attorney might determine which specific sections of the penal law had been violated, and take appropriate action. Thereafter Sparber was indicted * * *."

Mr. Wiener's affidavit further averred:

"* * * In the event that the name of Myron M. Sparber is not stricken from the roll of attorneys as a

> result of a felony conviction in the pending trial in General Sessions, it is the intention of the Co-ordinating Committee to ask leave of the Appellate Division to institute a disciplinary proceeding alleging professional misconduct on the part of said Sparber * * *."

As the above quoted affidavit of the Coordinating Committee's Chief Counsel, Mr. Wiener, plainly stated, the Committee saw fit in this particular case to propel the matter directly into the forum of criminal prosecution rather than to conduct disciplinary proceedings in the first instance. The indissolubly integral role, then, of the Co-ordinating Committee in this entire criminal prosecution from its very outset, creates the highly anomolous situation in which, as we ventured to phrase it earlier, the Appellate Division, First Department, called upon to exercise its statutory appellate jurisdiction under § 517 of the N.Y. Code of Criminal Procedure, sat as "Judge" in reviewing a judgment of criminal conviction which that very Court (*per* its own official instrumentality, the Coordinating Committee) in effect instituted and actively fostered.

We moved in both of the Appellate Courts below, as seen, that the appeal should be transferred to the Appellate Division of another Department, but this was denied.

It is hardly necessary to cite authority for the principle that due process requires an impartial tribunal. *Jordan* v. *Massachusetts*, 225 U.S. 167; *Tumey* v. *Ohio*, 273 U.S. 510; *Fay* v. *New York*, 332 U.S. 261 ("before a tribunal not biased by interest in the event"). Cf. also, 10 A.L.R. 2d 1307 ("Interest of Judge In An Official Or Representative Capacity", etc.).

It is submitted that this situation, in which state courts have acted as both prosecutor and judge, resulting in the criminal conviction and the consequent disbarment of a lawyer of prior unblemished reputation, merits this Court's attention and review.

3. On January 11, 1962, just prior to the commencement of the trial under this indictment, petitioner's present counsel (Maurice Edelbaum, who was also defendant's counsel at the trial) made a motion before the Honorable Joseph A. Sarafite, the Justice who had been assigned to try this case, to disqualify himself. In support of this motion counsel stated (Minutes of Jan. 11, 1962):

> "Your Honor, I was not the original attorney in this case. The defendant was represented by a former Assistant District Attorney now practicing law named Carl Rubino * * * " (p. 3).
>
> "He tells me—and I accept what he tells me—he tells me that after he had retained Mr. Rubino, that during some of the conferences with Mr. Rubino, that he was told that he should plead guilty to a felony; and if he pled guilty to a felony in this case, he could select whatever judge his lawyer or himself decided to plead guilty before. But that if he didn't plead guilty, he would be tried before your Honor. And they said to him that in the atmosphere that would be prevailing in your courtroom, that he would undoubtedly be convicted, and that if he was convicted he would positively go to jail in your courtroom, regardless of his background, regardless of anything, under this indictment.
>
> "Subsequently, I told this to Mr. Clark,* and I also told it, very informally, to your Honor" (pp. 3-4).
>
> * * * * *

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* The Assistant District Attorney.

"Mr. Clark then informed me, some time ago, when the case was on the calendar, that you would not be the Judge who would try this case.

"Of course you are familiar and I am familiar with the fact that in this County the District Attorney selects the Judge before whom the case is to be tried. He told us that you would not be the Judge, and the reason he gave me is that he said to me that your Honor had informed him that because of the strenuous cases that you had had in a row, that you didn't want a very strenuous case again, and that therefore this case would not be tried before you.

"Of course, after I was told this case would not be tried before you, I informed my client of that fact, and he said to me, 'I don't believe it. You will see that I will still be tried before Judge Sarafite as I was promised by my prior lawyer, if I didn't plead guilty to this felony' " (pp. 4-5).

* * * * *

"Last week Mr. Clark called me and said that he was abandoning the motion to consolidate, and I said, 'Where are we going to try this case?' He said, 'We will try it before any Judge whose calendar would be free on that day to try the case.' So I said, 'Well, Frank, tell me, do you mean Judge Sarafite?' He said, 'If Judge Sarafite will be free on that day, he will be tried before him.' I said, 'I thought you told me that this case would not be tried before Judge Sarafite.' He said, 'Yes, I told you that, but I can't help it; that is, I can't do anything about it.'

"When I informed my client of this situation, he told me, "I told you that I was right.' He said, 'I am convinced that the District Attorney is making Judge Sarafite the hatchet man, as Judge Mullen was when he was on the bench, as I have been told

> by other people.' Well, I said, 'I can't help anything about it at all. All I can do is present the facts before Judge Sarafite and let him decide what should be done.'
>
> "Your Honor, I think that in the context of what has happened, that I am entitled to when a defendant is on trial—and this defendant contemplates taking the stand on his own defense—I am entitled to a defendant free of any mental aberration because of the feeling he has that the District Attorney has selected the Judge to convict him; and I think in this case I am entitled to have your Honor disqualify yourself in this case" (pp. 5-6).

In replying (Minutes of January 11, 1962, pp. 6, *et seq.*) to the above quoted remarks of defense counsel, Assistant District Attorney Clark, apparently in a moment of injudiciousness prompted by zeal, stated to Judge Sarafite that in previous discussions which he [Mr. Clark] had had with the defendant's prior attorney, Carl Rubino, "I convinced Mr. Rubino that this defendant was guilty. Mr. Rubino told me that he would not want to try this case ever, and would persuade his defendant to plead guilty."

The Assistant District Attorney further stated that he had made no commitment to, and had not even had any discussion with the defendant's prior attorney (Mr. Rubino) about the question of which Judge should try this case. He conceded that he had had a discussion along those lines with the defendant's new attorney (Mr. Edelbaum), but such discussion had centered only around the question of the crowded condition of the Court calendar. Mr. Clark also denied that he ever stated at any time that the defendant would have to go to trial before Judge Sarafite unless he pleaded guilty.

However, at page 14 of the Minutes (1/11/62) Mr. Clark said: ". . . I . . . state clearly . . . if the defendant wants to plead now, I would have no objection to his selecting any Judge before whom he wanted to plead."

Judge Sarafite stated, defense counsel assenting that such was true, that the statements attributed to Mr. Clark about the defendant's having to be tried before Judge Sarafite unless he pleaded guilty had never been brought home or made known to Judge Sarafite. Defense counsel, however, pointed out "it is inferentially being said now." Defense counsel then further stated (pp. 16, 17):

> "Mr. Edelbaum: One thing was said here, that I don't think should have been said, and that was said by Mr. Clark in your presence.
>
> The Court: What is that?
>
> Mr. Edelbaum: That Mr. Rubino was convinced of his guilt and was going to persuade him to plead guilty. He shouldn't have said that before your Honor" (p. 16).
>
> * * * * *
>
> "Mr. Edelbaum: And I say this, your Honor, that Judges perhaps have a greater ability to disregard certain things that are said than ordinary jurors, but still Judges are human beings, and the remarks made by Mr. Clark of what Mr. Rubino felt about this case, could understandingly prejudice your Honor in this case" (p. 17).

Thereafter, at the request of defense counsel, Judge Sarafite consented to hear a statement from the defendant himself, which was as follows (pp. 20-21):

> "The Defendant: May it please your Honor, I just want to indicate that not only did Mr. Rubino tell me that an atmosphere which would be created by you

would assuredly result in my conviction, and if convicted would assuredly result in my being imprisoned despite no previous record, and my record in the community, but at a conference held in the office of Mr. Sol Gelb, at which time he represented Mr. Glassman my associate, I asked Mr. Gelb in the presence of Mr. Rubino if he believed, as Mr. Rubino did, concerning what would happen if I went to trial before your Honor, and Mr. Gelb reaffirmed Mr. Rubino's statement. It was thereafter that I retained Mr. Edelbaum. After Mr. Edelbaum got into the picture he called me up one Friday night, long distance from Atlantic City, he had been to New York and had gone back to Atlantic City to join his wife, and knowing of my trepidation and fear, he told me quite jubilantly that Frank Clark had told him that under no circumstances would Judge Sarafite be the judge in this case.

"With all due deference to your Honor, I was delighted in view of the information which I had received from counsel, but nevertheless I asked Mr. Edelbaum, 'Are you sure; because I don't know if you can really rely on this.' He said, 'When Frank Clark tells me something in the manner in which I am relating it to you, you can rely on it 100 per cent.'

"Despite that, I still had trepidations. I again asked him, 'Are you sure? Are you certain?' 'No question about it, because I know Frank Clark for many years, although I never tried a case with him. A representation from Frank is as good as a guarantee.'

"Then, of course, immediately after he got a call from Frank Clark indicating you might be the Judge if you were free. I reminded him of his guarantee, and he said, 'I don't know. It's not my fault, it has

never happened to me before where a man went back on his promise.'

"The point I am trying to make is that now not only is my confidence in some way disturbed in the type of trial that I will get or in the type of treatment I will get, if God forbid there should be a conviction, but I am also quite apprehensive concerning any statement that any District Attorney will make to me. It is going to be very difficult for me in view of this past history to rely upon anything that is told to me by the Court, by the District Attorney, or even by my own counsel.

"That is what I wanted you to hear." (pp. 20-21)

Near the end of the aforesaid motion proceedings occurred the following colloquy between defense counsel and Assistant District Attorney Clark (22):

"Mr. Clark: Judge, I want to make one statement. At no time did I ever use any language to Mr. Edelbaum 'Under no circumstances would Judge Sarafite ever try this case', or did I ever give a guarantee.

Mr. Edelbaum: Of course he didn't guarantee and he didn't use that language, but he did say to me, and I don't think that Mr. Clark denies that, that you were not going to try this case.

Mr. Clark: What do you mean?

Mr. Edelbaum: That Judge Sarafite was not going to try the case. You told me that, Frank Clark.

Mr. Clark: I didn't use that language.

Mr. Edelbaum: I disagree with you. Now I am offended." (p. 22)

The foregoing inevitably focuses attention upon the peculiar power, apparently enjoyed by the District Attorney of New York County for many years, in effect to select the

General Sessions Court* Judge who should try a particular criminal case. In a moment we shall examine the legal background—or rather the ostensible "legal" background—of this strange power of the District Attorney of New York County, but first we would mention that the above quoted and described motion proceeding for the disqualification of Judge Sarafite in the instant case illustrates vividly how this power of the District Attorney may be used to whipsaw a defendant into pleading guilty lest he be dragooned by the prosecutor before a "hanging judge". As seen, Assistant District Attorney Clark was still plying the whipsaw in the very motion proceedings in question, Mr. Clark having said "I * * * state clearly * * * if the defendant wants to plead now, I would have no objection to his selecting any judge before whom he wanted to plead" (minutes of January 11, 1962, p. 14). And the event proved just how destructively slashing the whipsaw could be. The unhappy fact is that petitioner Sparber was tried by a Judge whose bias weaves through this trial.**

What is the "legal" basis for the extraordinary whipsaw power which the District Attorney of New York County exercised in this case? The entire situation is revealingly disclosed in *Gleason* v. *Mullen*, 204 Misc. 450, 121 N.Y.S. 2d 605 (S. Ct. N.Y. Co. 1953—Eder, J.):

> "It has been the traditional practice for the district attorney of New York County to prepare the trial calendar in the Court of General Sessions and to assign cases for trial to the various parts of the

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* Now the Supreme Court.

** Detailed demonstration of this bias is beyond the scope of this Petition. We would make the demonstration in a brief on the merits.

court. This has also been the practice with regard to the County Court in Kings county. McDonald v. Goldstein, 273 App. Div. 649, 79 N.Y.S. 2d 690. This calendar practice has been performed and discharged by the district attorney without any express statutory authority conferred upon him. It is now claimed by petitioner that such action by the prosecutor is illegal and that the preparation and control of the trial calendar is vested exclusively in the court and cannot be delegated to another and if done it is unlawful and ineffective.

"As this court views the matter the petitioner's application is devoid of merit and legal stability.

"Section 55-a of the Code of Criminal Procedure, vests in the Court of General Sessions the power to make rules and regulations regarding its government and practice, and provides:

> 'The court of general sessions of the county of New York shall have power at all times to make rules and regulations for its government and conduct and for the practice therein, and to enforce the same by imprisonment for contempt, or by fine, or by both.'

"Pursuant to and within these legislatively declared powers the court promulgated the following rule governing its conduct and practice:

> 'Rule V.
>
> 'Moving a case for trial.
>
> 'The district attorney of the county of New York is authorized to move for trial prison or bail cases, including homicide and protracted cases, in any trial part of the court.'

"As the court apprehends the petitioner's premise it is that this constitutes a delegation of judicial power to the district attorney and hence his designation of petitioner's indictment for trial is illegal and should be prohibited.

"There is no substance to this claim. It is very clear that in authorizing the district attorney to so act the court was merely utilizing him in a ministerial capacity for clerical service and was in no sense transferring or abdicating its jurisdiction, functions and powers; these the court fully retained. The court's control over the calendar continued and remained unimpaired. It could recall, suspend and revoke the rule at its pleasure.

"The modern tendency, and, indeed, it has also been so in the past, is for the courts to relieve themselves of ministerial or administrative work which is intertwined with their strictly judicial functions and to have such work performed by others to whom it may be assigned. It is recognized that unless this procedure is employed the work of the court in pursuance of its strictly judicial functions will be and does become impeded and retarded and may become impossible of proper and speedy performance and it has been stated that this may result in the wheels of government becoming clogged, with resulting chaos, Ray v. Parker, 15 Cal. 2d 275, 291, 101 P. 2d 665, 673.

"To assign to others such type of work is not a delegation of judicial power as that term is understood and applied in law. Ray v. Parker, supra. It is but employment of an aid in the performance and discharge of the judicial function.

"In final aspect, in applying for the order of prohibition sought, petitioner's basal apprehension appears to be that if the practice is sustained of per-

mitting the district attorney to prepare and control the trial calendar and to make the assignment of cases for trial to a particular part of the court and to designate the case for trial before a particular judge, a defendant is placed at a disadvantage and is deprived of a fair and impartial trial and impedes the true administration of justice; that, seemingly, there is an inescapable feeling that the trial judge will favor the prosecutor and the People to the prejudice of the defendant. It is an absurd view.

"As to the defendant's guilt or innocence the decision is made by the jury and not by the trial judge so that the claim that the district attorney obtains an advantage on the issue of guilt or innocence is purely a fallacious one, and destitute of merit.

"The court, after careful consideration of the petitioner's contentions, is unable to perceive that the practice assailed is improper or illegal in any manner; it is a proper and legal practice and in no way violates any statutory or constitutional provision or in any way invades or infringes upon any statutory or constitutional rights of the petitioner as defendant in the criminal action against him."

It thus appears that the awesome power of the District Attorney of New York County to whipsaw criminal defendants in the manner that occurred in our case does not even rest upon any explicit statutory authority, but upon a rule of court adopted purportedly under a general statute authorizing the former Court of General Sessions to make "rules and regulations." Indeed it is even doubtful whether the court rule mentioned in the *Gleason* case was ever intended to give the District Attorney this whipsaw power either in law or in practical effect, for the language of the

rule is far from unambiguously establishing such power in the District Attorney, and Mr. Justice Eder's opinion above quoted strives mightily to avoid the idea that the District Attorney does have any such power which would be beyond judicial supervision and control. The fact remains that this power has traditionally been asserted and used without interference, as illustrated in our case.

Justice Eder's opinion in *Gleason* v. *Mullen, supra,* implicity recognizes that such a whipsaw power in the District Attorney is not to be acknowledged, but is rather to be explained (rationalized might be the better word) as remaining subject at all times to some theoretical type of judicial control—which in practice just never seems to be exercised.

We shall not undertake an extensive analysis of the reasoning in *Gleason* v. *Mullen,* but we think it is not unfair to say that the reasoning of that decision is far from being a model of persuasiveness. It is hardly convincing to tell a defendant who sees the District Attorney's whipsaw coming at him that everything is alright because the Court "could recall, suspend and revoke the rule at its pleasure." It is scarcely any more consoling to a defendant in such a plight to be told that all that is happening to him is that he is participating in "the modern tendency * * * for the courts to relieve themselves of ministerial or administrative work * * * ". Nor do we think that many defendants would be reassured, in this situation, by the knowledge that they are helping "the wheels of government [from] becoming clogged, with resulting chaos." And if such a defendant entertained a last-ditch hope of enlightenment from reading the judicial precedents cited in *Gleason* v. *Mullen* he would be doomed to disillusionment, because the case of

McDonald v. *Goldstein*, 273 App. Div. 649, 79 N.Y.S. 2d 690 (2nd Dept. 1948), affirming 191 Misc. 863, 83 N.Y.S. 2d 620 (cited in *Gleason*), rejected a similar claim of power by the District Attorney of Kings County to control the criminal dockets of the County Court of Kings County;* and the case of *Ray* v. *Parker*, 15 Cal. 2d 275, 291, 101 P. 2d 665, 673 (cited in *Gleason*) involved the scarcely pertinent topic of state milk control legislation in California.

The decision in *Gleason* v. *Mullen* has never been followed, as far as we can find, by any other Court. We submit that the case well merits this oblivion.

Nevertheless, the Petitioner Sparber was denied due process of law by the conduct of the District Attorney in forcing him to choose between a plea of guilty and a trial before the Honorable Judge Sarafite. He was also denied due process of law by the refusal of that Judge to disqualify himself.

4. In view of this Court's decision of April 5, 1965 in *Melvin C. Jenkins* v. *United States* (Oct. Term, 1964, No. 761), we respectfully urge that the circumstances of our case involve coercion of a jury verdict in violation of the due process clause. Petitioner was denied a fair trial by the Trial Court's abuse of discretion in declining to instruct the Jury under §428 N.Y. Code of Criminal Procedure, and in declining to discharge the Jury as being deadlocked. The said §428 provides, in pertinent part:

> "After the Jury have retired to consider of their verdict, they can be discharged before they have agreed thereon * * *

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* Silver v. Gassman, 12 M. 2d 58, 171 N.Y.S. 2d 314, 317 (S. Ct. Kings Co. 1957), Affirmed 6 A.D. 2d 277 (2nd Dept. 1958).

> 2. When after the lapse of such time as shall seem reasonable to the Court, they shall declare themselves unable to agree upon a verdict; * * * ".

As noted earlier, the defense fruitlessly requested the Court to read to the Jury the above quoted statute, after the Jury had been deliberating for several days in this case, and had still been unable to come to an agreement. The Court declined to do so.

We have found no decided case under the above statute which deals either with the question of a defendant's right to such an instruction, or with the question of the reviewability, on appeal, of the trial court's exercise of discretion in either declining to give such an instruction or in declining to discharge the Jury under the authority of the statute.

We submit, however, that on principle neither of these branches of a trial court's discretion in a criminal case should be held to be absolutely unreviewable under any and all circumstances and regardless of the compelling circumstances disclosed upon the record of a particular criminal trial. See the recent Annotation on this subject in 93 A.L.R. 2d 627.

We, therefore, respectfully urge this Court to grant review herein, on the ground that the petitioner was denied a fair trial by an impartial and uncoerced jury in that the trial court not only manifestly and grossly abused its discretion in not discharging the Jury after its inability to reach a verdict had become so plain (i.e., after so unprecedently protracted a deliberation), but in any event on the ground that it was error to refuse the express request of the defense to inform the Jury of the provisions of § 428 of the Code of Criminal Procedure in that thereby the co-

ercive impact of the situation upon the Jury was effectively maintained since the Jury was given no opportunity to know that the law provided an alternative avenue of action for them whereby they could free themselves (and the defendant) from such coercive impact.

When it is borne in mind, moreover, that the Jury in this case acquitted the petitioner on Count 16 (the grand larceny count which was directly companion with the subornation charges involving the same Lewis Rice and the same alleged transaction), and when this circumstance is considered along with the Jury's inability to agree on a verdict as to all except one other of the sixteen counts in the indictment, a situation emerges which is strongly indicative of a "compromise verdict" of the sort which is forbidden by both State and Federal constitutional standards. N.Y. Code of Criminal Procedure, § 465, par 4 ("When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors"); *People* v. *Saitta,* 170 App. Div. 665, 156 N.Y.S. 675 (1st Dept. 1915). See also *Hyde* v. *United States,* 225 U.S. 347; 53 Am. Jur. 714 (*Trial,* § 1033).

And at the very least, upon a trial record which, like the instant one, so strongly imports the likelihood of a jury "compromise" in a setting of inconsistent verdicts, the principle should be applied that the record should be closely examined for injustice. See *Manley* v. *United States,* 283 F. 2d 211, 222 (C.A. 6, 1956);

> " * * * when an obviously inconsistent verdict as to different Counts * * * is returned by the jury, both the Trial Court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

5. Petitioner was denied a fair trial and his rights of due process of law, and he was also denied his constitutional rights of counsel, through the admission in evidence of testimony and of alleged transcripts of deceitfully staged and electronically eavesdropped conversations. Petitioner was prejudiced by these items because they all formed part of an unconstitutional design by the prosecution working in conjunction with the Coordinating Committee secretly and deceitfully to place petitioner in positions in which he might unknowingly incriminate himself. These tactics were improper and unconstitutional because petitioner was a prime suspect of criminal investigation at the time in question and he was therefore entitled to his constitutional rights of counsel and due process under *Massiah* v. *United States,* 377 U.S. 201 and *Escobedo* v. *Illinois,* 378 U.S. 478.

The tactics of secretly and deceitfully trying to make the within petitioner incriminate himself included the following:

(a) Staged conversations between petitioner and Dr. and Mrs. Igra, in petitioner's office, which were planned and carried out under the instructions of the District Attorney and after the doctor and his wife were collaborating with the prosecution (1108-1112, 1326-1327). These staged conversations made possible testimony in this trial which indisputably must have lessened petitioner's chance for an acquittal.

(b) In evaluating the overall due process quality of the prosecution's tactics in resorting to deceit and trickery through the complaisance of Dr. Igra, it is pertinent to refer to Dr. Igra's having been equipped with a miniphone

for his staged interview with Richard Levy, a client of petitioner (1355, 2843-2879, 3037 et seq.). One of the People's arguments in support of the admissibility of this item on the theory of "prior consistent statement" was that Levy was the "agent" of petitioner. The Igra-Levy miniphone recording, like the testimony of the alleged conversations between petitioner and Dr. and Mrs. Igra, must surely have lessened the petitioner's chances for an acquittal.

(c) In connection with the charges involving petitioner's client Calvin Rodgers, under Counts One, Two and Fifteen (as to all of which the Jury disagreed) the People introduced in evidence, over defense objections, a profusion of evidence based on recordings of alleged telephone conversations with both petitioner and the latter's office associate Mervin Glassman, done with the consent of Rodgers after he had started cooperating with the police (215-217, 257-283, 297, 302, 308, 317, 392-397, 408-409, 412-416, 423-428, 449-451, 458-497, 504-518, 527-537, 542-567). Although the Jury disagreed on the counts involving Calvin Rodgers, all of this testimony received under the conspiracy count was specifically allowed by the Court to be used by the Jury, it will be recalled, to convict petitioner under any and all of the substantive counts. And the Rodgers telephone conversations in which he was acting as a police agent with the express design of getting petitioner to incriminate himself could not have failed, once again, to lessen petitioner's chance for acquittal under the indictment as a whole.

(d) Perhaps the single most striking instance of these police tactics aimed at tricking petitioner into incriminating himself occurred in connection with his client Leon R. Cohen, who was involved in Counts One, Three, Four

and Fourteen of the indictment as to all of which counts the Jury disagreed. On April 16, 1960, Cohen was sent to petitioner's office by Assistant District Attorney Clark to stage another of these deceitful conversational scenes (623). The prosecutor had Cohen accompanied by a policewoman, Ruth Smith, who posed as Cohen's wife (625-629, 913-916). Leon Cohen and "Mrs. Cohen" engaged petitioner in a conversation concerning which both of them testified in this trial (see pages cited *supra* in this paragraph). This conversation, again, must indubitably have lessened petitioner's chance for an acquittal under any and all of the counts of the indictment despite the Jury disagreement on the Leon Cohen counts, because of the Court's astounding authorization to the Jury to consider the conspiracy proofs as grounds for conviction under all of the substantive counts. Indeed, see specifically the Court's charge at 4176-4177, telling the Jury that the policewoman Ruth Smith's testimony could be used as "corroboration" of any or all of the counts charging subornation or attempted subornation.

In these circumstances, there comes into play the rule of the *Massiah* and *Escobedo* cases, *supra*. The admission in evidence of the above-described proofs of staged and eavesdropped conversations worked a denial of petitioner's constitutional right to counsel and due process.

6. In the event of the granting of certiorari we respectfully reserve the issues as to the Fourth Amendment search and seizure aspects of the branch of the case discussed under our item no. 5, *supra*, in these "Reasons For Granting The Writ".

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner
Myron M. Sparber

APPENDIX A

Judgment and remittitur of the Court of Appeals of the State of New York herein sought to be reviewed.

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of March in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur March 11, 1965.

No. 168

The People &c.,

Respondent,

vs.

Myron Sparber,

Appellant.

BE IT REMEMBERED, That on the 20th day of April in the year of our Lord one thousand nine hundred and sixty-four,

Appendix A

Myron Sparber, the appellant in this cause, came here unto the Court of Appeals, by Maurice Edelbaum, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Maurice Edelbaum, of counsel for the appellant, and by Malvina H. Guggenheim, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the

form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 11, 1965.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON
Clerk.

APPENDIX B

Order granting motion to amend remittitur of Court of Appeals.

1 Mo. No. 378

The People Etc.,

Respondent,

vs.

Myron M. Sparber,

Appellant.

Motion to amend the remittitur granted; the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

"Upon the appeal herein there was presented and necessarily passed upon an alleged denial of a fair trial in violation of constitutional process guaranteed by the fourteenth amendment to the Constitution of the United States by the refusal of the Trial Court to compel disclosure of certain testimony given before the Coordinating Committee on Discipline of the First Department which denial amounted to a suppression of testimony which the defendant claimed would prove exculpatory; by the trial judge's refusal to disqualify himself from the trial; by the District Attorney's control over the trial calendar and by the admission into evidence of testimony and recordings made between the defendant and his former associates and certain witnesses and by the review in the Appellate Division since the crim-

inal prosecution had followed an investigation initiated by the Coordinating Committee on Discipline which was in effect the initiation of prosecution by the Appellate Division, First Department, and, as such, disqualified that court from reviewing the matter on appeal. The Court of Appeals held that the appellant's constitutional rights had not been violated."

Raymond J. Cannon
Clerk, Court of Appeals
Albany, N. Y.

4/22/65

APPENDIX C

Copy of index of petitioner's printed brief in the Court of Appeals, showing points there raised, including Federal questions.

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ARGUMENT:

POINT I—The judgment of conviction under Count Ten (attempt to suborn Lewis Rice) should be reversed because—

(A) there was insufficient legal evidence of guilt for submission to the jury;

(B) the verdict is a compromise verdict of the type which the law forbids (Code Cr. Pr. §465);

(C) the People failed to meet their burden to prove the requisite corroboration of defendant's scienter of the falsity of the testimony of Lewis Rice allegedly attempted to be suborned;

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(D) the defendant was denied a fair trial by the charge to the jury that Rice was not an accomplice as a matter of law; and as a matter of law the accomplice testimony of Rice was insufficiently corroborated (Code Cr. Pr. §399);

(E) the defendant was denied a fair trial by the Court's prejudicially inaccurate description, in its charge to the jury, of the testimony of the witness Conrad;

(F) the defendant was denied a fair trial by rulings as to the admission and exclusion of testimony;

(G) the defendant was denied a fair trial by the Court's refusal to compel disclosure of the coordinating committee testimony of Daniel Schliftman, whereby the Court sustained the People's suppression of testimony which the defense claimed would prove exculpatory, and thereby denying to the defendant due process of law in violation of the Fourteenth Amendment of the Federal Constitution;

(H) the defendant was denied a fair trial by the unqualified instruction to the jury that proofs under the conspiracy count could be used to convict under any or all substantive counts of subornation or attempted subornation;

(I) the defendant was denied a fair trial as to Count Ten by reason of prejudice arising from the submission to the jury, and from the trial, of all of the charges of the indictment as a whole, and for all of the reasons advanced under other points of this brief wherein it is urged that the defendant was denied a fair trial 10

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(A) there was insufficient legal evidence of defendant's guilt for submission to the jury. In particular, the applicable requirements as to corroboration of accomplice testimony were not met;

(B) further as to the requirement of corroboration, the Court erroneously refused to instruct the jury that witnesses (without whose uncorroborated testimony the defendant could not have been convicted) were accomplices as a matter of law;

(C) the defendant was denied a fair trial by the Court's instructions to the jury which expressly allowed the jury to convict under Count Five on the basis of evidence received under other substantive counts plus hearsay evidence received under the conspiracy count, there being not one word in the instructions as to the need to segregate such hearsay in deciding upon the substantive counts;

(D) the defendant was denied a fair trial by the admission of inadmissible hearsay on the theory of "prior consistent statement." This ground is respectfully believed to involve error

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(1) This entire criminal prosecution has in effect been initiated and fostered by instrumentalities of the judicial branch of the government

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of this State, the Coordinating Committee being an official instrumentality of the Court below, and said committee having acted since April 1960 in this case as an initiating and actively participating arm of the prosecutor's office. The Court below was called upon to review the judgment of conviction which is the product of the official acts of the Court's own official instrumentality. The judicial branch of the government of this State has thus far been in the position of both prosecutor and judge in this case.

(2) The defendant has been pursued in this case with an official relentlessness amounting to unconstitutional oppressiveness. The prosecutor used his power of control over the Trial Calendar in an unconstitutional manner so as to confront the defendant with the unjust alternative of pleading guilty or of being forced to trial before a hostile judge. The defense motion for disqualification of the Trial Judge should have been granted. The hostility and bias of that judge were shown in the trial and in the sentencing 113

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